No. 85-528

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

RONALD L. GOLDFARB,
Petitioner,

v.

SUPREME COURT OF VIRGINIA, *ET AL.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED*

May a state, consistent with the Commerce and Due Process Clauses, deny an experienced attorney the opportunity to be admitted to the state bar without examination, solely because he is unwilling to practice full-time in that state and abandon his existing practice in an adjoining jurisdiction, where there has been no factual showing that this discriminatory treatment advances the asserted purpose of assuring attorney competence?

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*In addition to the Supreme Court of Virginia, the other respondents are its clerk, who was Allen L. Lucy when the case was filed and is now David B. Beach, and its executive secretary, Robert N. Baldwin.

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RONALD L. GOLDFARB,
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SUPREME COURT OF VIRGINIA, *ET AL.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Ronald L. Goldfarb respectfully petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit for the following reasons.

REFERENCE TO OPINIONS

The judgment of the United States District Court for the Eastern District of Virginia, Alexandria Division, is reproduced in the Appendix ("App.") at page 14a. The transcript of the oral argument on respondents' motion to dismiss, in which the district court stated its reasons for granting that motion, appears at pages 11a-13a. The memorandum and order denying petitioner's motion for re-

consideration appears at pages 15a-18a. These opinions are not reported.

The opinion of the United States Court of Appeals for the Fourth Circuit affirming the district court's judgment is reported at 766 F.2d 859 (1985) and is reproduced at pages 1a-10a of the appendix. The judgment entered by the court of appeals appears at page 19a.

JURISDICTION

The judgment of the court of appeals was entered on 3 July 1985. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The pertinent constitutional provisions and the state court rules at issue here are reproduced as Appendix F at pages 25a-27a of the appendix to this petition.

STATEMENT OF THE CASE

Petitioner Ronald L. Goldfarb, who has been a resident of Virginia since 1961, was admitted to the New York bar in 1956 and subsequently to the California and District of Columbia bars. Since 1966, he has practiced law in the District of Columbia in the firm now known as Goldfarb & Singer (App. 2a).[1]

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[1]Petitioner is not related to the petitioners in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). The facts stated in this section of the petition were alleged in petitioner's complaint, and since the case was dismissed for failure to state a claim, these assertions are to be accepted as true. *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167 (1967).

Petitioner has several regular clients who require legal representation in Virginia on an ongoing basis. In addition, he is periodically asked to represent new clients in Virginia on particular matters (App. 2a). Because he is not a member of the Virginia bar, he cannot represent these clients by himself, and he must either refer the matter to a Virginia lawyer or affiliate with local counsel in Virginia. Each option burdens the petitioner and/or his clients: either petitioner must deprive himself of a fee by referring the matter to a Virginia lawyer, reduce his fee to compensate local counsel, or charge the client a higher fee to pay for local counsel's services (App.3a). For these reasons he sought admission to the Virginia bar.

In January 1983, petitioner submitted to respondents a properly completed application for admission to the Virginia bar without examination (App. 2a). Under Rule 1A:1 of the Supreme Court of Virginia (App. 25a-27a), admission without examination is available to attorneys who have been licensed by another state for at least five years, provided that the applicant can show that he or she has "made such progress in the practice of law that it would be unreasonable to require him to take an examination." In addition, the applicant must be a "permanent resident" of Virginia and must intend "to practice full time as a member of the Virginia bar." Those who do not meet all these requirements must take the Virginia bar examination; those who pass the exam may be admitted even if they do not live in Virginia and without regard to the extent that they intend to practice in Virginia after they are admitted. However, those persons admitted on motion must continue to practice law in Virginia on a full-time basis.

In response to an inquiry from the Virginia Supreme Court about his plans to practice in Virginia, petitioner

stated that he planned to open an office in a building near his home in Alexandria to serve Virginia clients, but that he would maintain his practice in the District of Columbia and would continue to serve his Washington clients from that office. His application was denied in November 1983, solely because of his failure to meet the full-time practice requirement of Rule 1A:1(d) (App. 3a).

In May 1984 petitioner challenged the validity of this full-time practice rule under 42 U.S.C. § 1983 in the United States District Court for the Eastern District of Virginia. Jurisdiction was based on 28 U.S.C. §§ 1331 and 1343(a)(3). His principal claim was that this restriction violated the Commerce Clause, but he also alleged a violation of the Due Process Clause of the Fourteenth Amendment. The heart of his claim is that Rule 1A:1 places an unconstitutional condition on an experienced lawyer's ability to engage in an interstate practice of law, by requiring him or her to abandon any interstate practice in favor of full-time Virginia practice, unless he or she is willing to take the Virginia bar examination. Shortly after he filed his complaint, petitioner served a brief set of interrogatories and a document production request designed to determine the factual basis for the restriction, the reasons why it was issued, and how it had been interpreted and enforced.

Before either answering the complaint or providing the discovery, respondents moved the district court to abstain or to dismiss for failure to state a claim on which relief may be granted under Rule 12(b)(6), Fed. R. Civ. P. Their legal memorandum asserted that the full-time practice requirement was essential in order to assure lawyer competence, but they offered no affidavits or other evidence to support this contention. Nor did they identify the specific

problems of lawyer competence which prompted the Virginia Supreme Court to adopt the full-time practice rule in 1968, whereas for many years before that, motion applicants simply had to promise to devote the "major portion" of their time to practicing law in Virginia. *Compare* Rule 1A:1 with former Rule 23 of the Supreme Court of Virginia, 184 Va. 1xxxii (1946).

The district court denied the motion to abstain, but dismissed the case (App. 11a-13a). The court reasoned that since Virginia could constitutionally impose the greater burden of requiring all applicants to take its bar examination, there could be no Commerce Clause violation if Virginia decided to condition admission to its bar "in any manner that is not excessive and that does not discriminate in some invidious way" (App. 12a). The district court also found the Rule to be valid under the Due Process Clause (App. 12a).

The court of appeals affirmed for essentially the same reasons as were stated by the district court. The court held that since Virginia could make every lawyer take its bar examination, it "can hardly be penalized for offering a choice between a requirement it can concededly exact and one that many attorneys may find less onerous" (App. 6a). The court thus rejected petitioner's argument that limiting admission without examination to those applicants who disavow any intent to engage in interstate practice is an unconstitutional condition to the same extent as if admission without examination were made available only to applicants of a certain race, religion, or political affiliation.

According to the court of appeals, the "constitutionality of state programs that condition eligibility on various grounds is an enormously complex congeries of subjects, far too complex to sustain Goldfarb's facile comparison"

(App. 8a). However, the opinion did not cite any of the decisions of this Court which have struck down unconstitutional conditions in a variety of situations, including conditions that burden interstate commerce. The court of appeals did state that unconstitutional conditions based on race or religion would fall under the Equal Protection Clause, but it asserted, again without citing any authority, that claims arising under the Commerce Clause are different because the "Commerce Clause in contrast creates no such personal claims" (App. 9a).

The court of appeals recognized that "Goldfarb's experience and familiarity with state law may be such that the full-time practice requirement is unnecessary to guarantee that he would ably serve the clients and courts that would depend on him in Virginia" (App. 4a). However, the court observed that its role was "not to conduct an individual inquiry into Goldfarb's qualifications" but only to determine "whether Virginia has adopted a rational approach to the serious problem of attorney incompetence" (App. 5a). In making this observation, however, the court of appeals apparently assumed that admission without examination is virtually automatic in Virginia, although under Va. S. Ct. Rule 1A:1(b), this privilege is only available to an applicant who has "made such progress in the practice of law that it would be unreasonable to require him to take an examination."

The court of appeals also found no error in the fact that the case had been dismissed on the pleadings, with no affidavits or any other evidence from either side on how the restriction actually burdens interstate law practice or on how it works to achieve the state's asserted goal of assuring competent Virginia practitioners (App. 6a-7a). In upholding the dismissal of petitioner's Commerce Clause claim, it found nothing improper in respondents' relying

on nothing more than the unsupported assertions in their legal memoranda about lawyer competence. The court explained that this summary approach was justified because otherwise state regulations might be unduly subjected to federal court scrutiny just because a plaintiff "is able to point to some effect, however indirect, upon interstate commerce" (App. 6a). "To require a hearing to weigh the relative impacts of all the other means the state might have chosen would deal a serious blow to the capacities of the states and localities to further even the most basic regulatory purposes" (App. 7a).[2]

Finally, the court of appeals addressed this Court's recent decision in *Supreme Court of New Hampshire v. Piper,* 105 S. Ct. 1272 (1985), which held that the Privileges and Immunities Clause of Article IV prevents a state from excluding applicants from its bar simply because they are non-residents. The court found *Piper* to have no relevance here, since that case arose under the Privileges and Immunities Clause (App. 10a). While acknowledging the common history and purpose of this Clause and the Commerce Clause, the court found "no logical path" from *Piper* to the present situation. It observed that "[s]everal of the concepts involved in *Piper* are certainly implicated here on varying levels of abstraction, but the angle of con-

[2]During oral argument in the district court, respondents' counsel initially offered an explanation of how the full-time practice rule assured lawyer competence: ". . . we all know that if we practice in Virginia courts, that [as] one aspect of the learning part of that practice, you hang around the lobby of the courtroom waiting for your case to be called, and you talk to other lawyers. And what do lawyers talk about? They talk about cases and specific points of law, or minutia of the law that serves a very important educational purpose." Transcript of 13 July 1984 hearing at p. 10. Counsel later stated that this practice was not respondents' justification for the restriction, but offered no other explanation about how the restriction promotes competence. *Id.* at 34.

nection is far too oblique to provide any leverage for overturning Rule 1A:1(d)" (App. 10a). The court of appeals also rejected petitioner's Due Process claim on the basis of this Court's summary affirmance in *Brown v. Supreme Court of Virginia,* 359 F. Supp. 549 (E.D. Va.), *aff'd mem.,* 414 U.S. 1034 (1973), which was principally an Equal Protection challenge to Rule 1A:1(d), in which the applicant was a lawyer who intended to maintain his full-time job in Washington, D.C. and had no intention of establishing a regular practice in Virginia (App. 4a-5a).

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS' DECISION HAS CREATED NOVEL AND UNSUPPORTED EXCEPTIONS TO THIS COURT'S HOLDINGS REGARDING UNCONSTITUTIONAL CONDITIONS, AND IT ALSO FAILED TO COMPLY WITH THIS COURT'S DECISIONS PROTECTING INTERSTATE COMMERCE AGAINST DISCRIMINATORY BURDENS.

Introduction

This case raises an important question about the right of a state, under the mantle of assuring attorney competence, to impose discriminatory conditions on persons seeking admission to its bar. As this Court observed in a due process context:

> A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law.

Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957).

In this case, as the court of appeals recognized (App. 4a), there is no question about petitioner's qualifications. Instead, the only question is whether Virginia may deny him the option of admission without examination solely because he does not wish to shut down his existing practice and devote himself to full-time practice in Virginia.

There are two key elements of the court of appeals' opinion, both of which constitute unprecedented departures from the decisions of this Court. The basic rationale of the court of appeals was that since Virginia could make every applicant take its bar examination, it has wide latitude to discriminate in waiving that requirement for select groups of applicants, so long as the discrimination is not obviously invidious, *i.e.*, based on race, religion or political affiliation. As shown in Point 1, *infra,* this analysis cannot be reconciled with numerous decisions of this Court which prohibit a state from conditioning the award of some benefit on the surrender of a constitutional right, even if the state has no obligation to give anyone the benefit in the first place.

The disposition of petitioner's Commerce Clause claim on the pleadings, without any evidence in the record, is also a serious departure from the numerous decisions of this Court under which it is improper to accept at face value a state's justification for a discriminatory rule. *See* Point 2, *infra.* At a minimum, the Commerce Clause requires a balancing of the putative local benefits against the extent of the burden on interstate commerce. That balancing test is fundamentally a factual inquiry which cannot be decided on the basis of bare pleadings and arguments of counsel, yet the court of appeals sustained this rule without a single affidavit or document in the record to support it.

It may be that the court of appeals assumed that regulation of the bar is somehow different and that constitutional principles uniformly applicable in other situations have no bearing here. If that is the unstated basis of the court's decision, then review is also appropriate in light of this Court's decisions recognizing that various other constitutional protections do not vanish entirely, simply because the subject matter involves the bar. *See, e.g., Supreme Court of New Hampshire v. Piper, supra; Bates v. State Bar of Arizona,* 433 U.S. 350 (1977); *In re Griffiths,* 413 U.S. 717 (1973). *Cf. Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975) (antitrust laws).[3]

1. **Misapplication of the Unconstitutional Conditions Doctrine.**

The court of appeals' decision is at odds with this Court's precedents regarding "unconstitutional conditions" in two key respects. First, the fact that Virginia has the option of abolishing admission without examination is not a valid reason for upholding a discriminatory condition. This point is illustrated in the leading case of *Speiser v. Randall,* 357 U.S. 513 (1957), where the state denied a tax exemption to persons who engaged in certain forms of protected speech. As this Court observed: "While the State was surely under no obligation to afford such an exemption, we held [in *Speiser*] that the imposition of such a condition upon even a gratuitous benefit inevitably deterred or discouraged the exercise of [constitutionally protected

[3]Many of the same considerations that warrant granting review on petitioner's Commerce Clause claim support review on his Due Process claim. Because of the considerable overlap, petitioner will not refer further to the Due Process Clause, but its presence in the case provides an additional basis for review. *See Schware v. Board of Bar Examiners, supra.*

rights] and thereby threatened to produce a result which the State could not command directly." *Sherbert v. Verner,* 374 U.S. 398, 405 (1963). This principle has been applied in a number of settings involving a variety of constitutional rights, including several cases decided just last Term. *See Cleveland Board of Education v. Loudermill,* 105 S. Ct. 1487 (1985) (due process right to a hearing); *Evitts v. Lucey,* 105 S. Ct. 830 (1985) (effective assistance of counsel); *see also Sherbert v. Verner, supra* (freedom of religion); *United States v. Chicago, M., St. P. & P.R.R.,* 282 U.S. 311, 328-29 (1931) (interstate commerce); *Perry v. Sindermann,* 408 U.S. 593, 597 (1972) (freedom of speech); *Garrity v. New Jersey,* 385 U.S. 493, 500 (1967) (right of self-incrimination).

The court of appeals recognized that some conditions could not be imposed on applicants seeking admission to the Virginia bar on motion, *i.e.,* it would be improper to excuse only applicants of a particular race, religion or political party from taking the exam. However, it treated Commerce Clause claims differently from other constitutional violations on the ground that the Commerce Clause "creates no such personal claims" (App. 9a).

There is, however, no basis in this Court's decisions for a conclusion that a state may condition the award of a benefit on an applicant's agreement to surrender some, but not other, constitutionally protected rights. The right to engage in interstate commerce, free of unreasonable state restrictions and discriminatory conditions, is no less protected from unconstitutional conditions than are other rights. "There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price. Engaging in interstate commerce is one." *Garrity v. New Jersey, supra,* 385 U.S. at 500; *see also Western &*

Southern Life Ins. Co. v. Board of Equalization, 451 U.S. 648, 663 n.14 (1981) (". . . a State may not impose unconstitutional conditions on the privilege of doing business within the State"); *Western Union Telegraph Co. v. State of Kansas,* 216 U.S. 1, 46-48 (1909). Indeed, the conclusion of the court of appeals is particularly ironic since this Court's early unconstitutional conditions cases almost always involved state efforts to impose discriminatory burdens on out-of-state firms seeking a license to do business in the state. *See, e.g., Hanover Fire Ins. Co. v. Harding,* 272 U.S. 494, 507-08 (1926); *Looney v. Crane Co.,* 245 U.S. 178, 188 (1917); *Sioux Remedy Co. v. Cope,* 235 U.S. 197 (1914).

Moreover, in the past two Terms, this Court has struck down a variety of state laws involving local favoritism of the sort at issue here. Earlier this year, for example, the Court employed equal protection analysis to strike down several state laws giving tax preferences to in-state residents or corporations, *Hooper v. Bernalillo County Assessor,* 105 S. Ct. 2862; *Williams v. Vermont,* 105 S. Ct. 2465; *Metropolitan Life Ins. Co. v. Ward,* 105 S. Ct. 1676. Last year the Commerce Clause was employed to strike down preferential state tax laws in *Bacchus Imports, Ltd. v. Dias,* 104 S. Ct. 3049; *Armco, Inc. v. Hardesty,* 104 S. Ct. 2620; and *Westinghouse Electric Co. v. Tully,* 104 S. Ct. 1856.

A recent case which is closely on point is *South-Central Timber Development, Inc. v. Wunnicke,* 104 S. Ct. 2237 (1984), where Alaska decided to sell timber from state lands only to bidders who at least partially processed the logs in that State. A plurality of this Court invalidated this in-state plant restriction as *per se* illegal under the Commerce Clause. *Id.* at 2247. Thus, even though Alaska had

no obligation to confer a benefit on a private firm by auctioning off its property, once it decided to do so, it could not require a buyer to perform certain business within the state as a condition of receiving that benefit. Despite the close analogy to this case, the court of appeals made no effort to explain why *South-Central Timber* does not apply.

To support his claim, petitioner relied on the holding in *Piper* that residence is not a valid basis for denying admission to the bar to those who took the bar examination, arguing that the burdens of a full time in-state practice rule are similar to those of an in-state residence rule and noting the common goals of the Commerce Clause and the Privileges and Immunities Clause. *See Hicklin v. Orbeck*, 437 U.S. 518, 531-34 (1978).[4] By upholding discrimination of this sort against motion applicants, the court of appeals has taken a position squarely at odds with that taken by the Massachusetts Supreme Judicial Court in *In re Jadd*, 391 Mass. 227, 461 N.E. 2d 760 (1984), which unanimously declared unconstitutional its rule that only Massachusetts residents could be admitted to the bar without taking the state's bar examination. In doing so, it rejected an argument which is central to the court of appeals' ruling here, *i.e.*, that discrimination against out-of-state practitioners was acceptable because they had the option of taking the bar examination. 391 Mass. at 236, 461 N.E.2d at

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[4]We note that Va. S. Ct. Rule 1A:1(c) also imposes an in-state residency requirement for motion applicants, although that is not an issue here, since petitioner has resided in Virginia since 1961. The district court apparently concluded that residency would not be a valid condition for admission without examination (App. 16a), but the court of appeals reserved that question for another day (App. 9a). We understand that the Supreme Court of Virginia considers this rule to be unaffected by *Piper* and that in-state residency is still required of motion applicants, even if they intend to practice full-time in Virginia.

766. A similar result was reached in the post-*Piper* case of *Stanley v. Missouri Board of Law Examiners*, ____ F. Supp. ____, 83-4434-CV-C-5 (W.D. Mo. 3 May 1985) (Appendix E, pp. 20a-24a).[5] On the other side is *Sestric v. Clark*, 765 F.2d 665 (7th Cir. 1985), in which the plaintiff, who lived and practiced in St. Louis, Missouri, was denied admission to the Illinois bar without examination because he was not an "actual resident" of Illinois.[6]

Although *Jadd*, *Stanley* and *Sestric* all involve the Privileges and Immunities Clause, the core issue that runs through each case is the same as that presented here: may a state impose conditions on motion applicants that require the surrender of constitutionally protected rights, regardless of whether those rights arise under the Commerce Clause, the Privileges and Immunities Clause, or some other provision of the Constitution. The court below concluded that the source of the constitutional right does make a difference in these bar admission cases, yet its ruling is in direct conflict with this Court's discussion in *Hicklin v. Orbeck, supra*, 437 U.S. at 531-32, of the "mutually reinforcing relationship" between the Commerce and Privileges and Immunities Clauses, "their common origin," and "their shared vision," and by the fact that the Court has employed Com-

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[5]*Stanley* was not appealed because the Supreme Court of Missouri promptly amended its rules to make admission without examination available to all qualified persons, regardless of residence, if they operate an in-state office "that is open and attended during normal business hours and at which service of papers may be made on the attorney." Mo. S. Ct. Rule 8.10(e), effective 31 May 1985. *See* 689 S.W.2d No. 2, pp. XLII - XLIII (25 June 1985).

[6]Rehearing in that case was denied on 1 August 1985, and we understand from counsel that a petition for certiorari will be filed shortly. Given the similarity of the issues, the Court may wish to consider this petition and that in *Sestric* at the same conference.

merce Clause precedents in its Privileges and Immunities Clause analysis.[7]

Thus, there is no close connection between Virginia's full-time practice requirement and the state's asserted goal of assuring attorney competence. This point is underscored by the fact that Virginia will grant admission without examination only to an experienced applicant who has "made such progress in the practice of law that it would be unreasonable to require him to take an examination." Va. S. Ct. Rule 1A:1(b). By imposing an additional full-time practice requirement, the Rule simply excludes qualified practitioners, such as petitioner, even if they live in Virginia and have a commitment to regular practice in that state.

At the heart of the court of appeals' analysis is its concern that a state rule which waives all or part of a state's licensing requirements inevitably benefits interstate mobility, and that if any aspect of this licensing scheme were to be struck down, such a ruling might "chase states into

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[7]The court of appeals did cite this language from *Hicklin*, but brushed aside petitioner's contention that *Piper* and the other Privileges and Immunities Clause cases supported his Commerce Clause claim. Here again, the court's analysis does not stand up under scrutiny. The court of appeals spoke of "important structural differences" between the two Clauses, referring to Professor Tribe's *American Constitutional Law* (App. 10a). However, the only significant difference that Tribe mentions is the fact that the Privileges and Immunities Clause does not protect aliens or corporations, L. Tribe, *American Constitutional Law* § 6-33, p. 411 & n.18 (1978), a distinction which has no relevance here.

Moreover, Tribe stresses that: "The protections of the privileges and immunities clause do significantly overlap those of the commerce clause" *id.* at 411-12 n.19, and that ". . . the *core* concerns of equal protection, article IV, and the commerce clause are remarkably similar: all address the problems that occur when governments inflict injury upon outsiders . . . ." *Id.* at 412 (emphasis in original).

the one certain sanctuary of a bar examination for all" (App. 7a), a result the court considered undesirable. However, there is nothing except unfounded speculation to support the notion that there would be a wholesale repeal of rules permitting motion admissions if the states were told they could not practice the type of local favoritism represented by Virginia's full-time practice requirement. Indeed, at least one commentator suggests that the trend may be in precisely the opposite direction. *See* Ashman, "A National Law Practice: Will *Piper* Lead the Way?" 54 *The Bar Examiner,* No. 3, at 30, 32 (Aug. 1985). In any event, this Court should evaluate this case under the assumption that the states will make a good faith effort to assure the qualifications of applicants rather than imposing excessive restrictions as a response to court rulings with which they disagree.

Moreover, this Court has never suggested that a discriminatory condition should be upheld because a court believes that the benefit in question is worthy of preservation. Yet that is precisely what the court of appeals did here. Instead of applying the unconstitutional conditions doctrine to these facts, the court speculated about how the states might react to a finding of unconstitutionality and concluded that it was more important to preserve the practice of admission without examination than it was to eliminate the discriminatory burden on interstate commerce. That approach does not fulfill the court's responsibility to determine whether Virginia has in fact violated the Constitution as alleged by petitioner.

Accordingly, because the decision below cannot be reconciled with the pertinent decisions of this Court and other courts and is likely to lead to continued confusion and further litigation, this Court should review the court

of appeals' application of the unconstitutional conditions doctrine in this case.

2. Ruling on a Commerce Clause Challenge With No Factual Record.

The court of appeals' decision is also at odds with this Court's basic Commerce Clause jurisprudence under which it has adopted two tiers of review: state laws that block interstate commerce at the border are judged under a virtual *per se* test of invalidity, *see, e.g., City of Philadelphia v. New Jersey,* 437 U.S. 617, 624 (1978), while state laws that regulate "evenhandedly to effectuate a legitimate local public interest" are judged on the basis of whether "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970).

Deciding a Commerce Clause case under either standard requires record evidence from both parties. Under the latter standard in particular, the issue of whether a restriction is "clearly excessive" is a question of fact in which the relative costs and benefits of the restrictions and the alternatives must be balanced. Thus, a plaintiff cannot prevail on a Commerce Clause claim simply by asserting that the restriction is burdensome, but must introduce evidence to prove the extent of the burden. On the other hand, a state cannot rest on the assertions of its counsel that the law in question promotes goals such as public safety or consumer protection or, in this case, lawyer competence, but it must show how the restriction works to achieve its putative goal.

Given the factual nature of the inquiry, it is understandable that a number of this Court's leading Commerce Clause cases were actually tried, *e.g., Kassel v. Con-*

solidated Freightways Corp., 450 U.S. 662, 667 (1981); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 460 (1981); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 122-23 (1978), or were decided only after the parties had submitted evidence to support their contentions, *e.g.*, *City of Philadelphia v. New Jersey*, 437 U.S. 617, 619 (1978) (summary judgment); *South-Central Timber Development, Inc. v. Wunnicke*, *supra* (preliminary injunction). *Compare Williams v. Vermont*, *supra* (reversing dismissal of complaint challenging discriminatory tax on equal protection grounds and remanding for a trial on how the tax actually operated).

The decision below stands this case law on its head. The district court accepted at face value respondents' claim that the full-time practice restriction promoted lawyer competence, even though they submitted no affidavits or other evidence to explain the nexus between full-time practice after admission and competence at the time of admission, or why the other requirements in the motion admission rule did not adequately assure that the applicant was qualified to practice law in Virginia. This contrasts with the factual record in *Piper*, where the state presented an affidavit from the Chief Justice of the Supreme Court of New Hampshire setting forth the state's explanation for the restriction in question.

Moreover, petitioner's attempt to take discovery on how the restriction operates or why it was imposed was rejected (App. 15a-17a). Nevertheless, the court of appeals affirmed, expressing a concern that to permit hearings on the validity of these sorts of restrictions would unduly burden the trial courts (App. 7a). However, it was not proper for the court of appeals to simply accept the state's assertions at face value. If the effect on commerce in a given case is

as negligible or indirect as the court of appeals suggests, then it could be easily disposed of on a motion for summary judgment. In that way, the goals of the Commerce Clause can be vindicated in cases where there is a significant burden on commerce, yet district courts will not be faced with lengthy litigation just because a plaintiff asserts a claim under that Clause.

If allowed to stand, this decision could be interpreted as giving district courts license to dismiss Commerce Clause claims on the pleadings if the state's counsel can assert any reason for the restriction which the district court finds plausible. Such a result not only violates Rule 56 of the Federal Rules of Civil Procedure, by denying plaintiffs the right to have an opportunity to establish the factual predicates for their claims, but it would strike at the heart of the Commerce Clause and its goal of preventing states from granting favors to in-state firms that disadvantage out-of-state firms.

Petitioner does not suggest that all Commerce Clause cases must go to trial. Indeed, the present case could probably be resolved on summary judgment motions, after some limited discovery on how motion admissions are administered in Virginia, how the full-time practice rule is enforced, and what evidence about the competence of lawyers admitted on motion prompted the Supreme Court of Virginia to adopt the full-time practice rule in 1968, when for many years before that, motion admittees simply had to spend the "major portion" of their time practicing in Virginia. *See* pp. 4-5, *supra*. Those issues were raised in interrogatories that petitioner filed in the district court, but the case was dismissed without respondents submitting a single piece of evidence.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 1985

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-1928

Ronald L. Goldfarb,

Appellant,

versus

Supreme Court of Virginia;
Allen L. Lucy, Clerk, Supreme Court of Virginia; and
Robert N. Baldwin, Executive Secretary,
Supreme Court of Virginia,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge. (C/A 84-508).

Argued: March 6, 1985 Decided: July 3, 1985

Before SPROUSE and WILKINSON, Circuit Judges, and KAUFMAN, Chief United States District Judge for the District of Maryland, sitting by designation.

Cornish F. Hitchcock (Alan B. Morrison; John Cary Sims on brief) for Appellant; Gregory E. Lucyk, Assistant Attorney General (Gerald L. Baliles, Attorney General; James T. Moore, III, Senior Assistant Attorney General on brief) for Appellees.

WILKINSON, Circuit Judge:

The Supreme Court of Virginia will admit an out-of-state attorney to the Commonwealth bar without examination only if the applicant intends to practice full-time in Virginia. The plaintiff, alleging that this requirement violates the Commerce Clause and the Due Process Clause, filed suit for declaratory and injunctive relief. The district court held that the rule does not exceed the authority of the Commonwealth or abridge the rights of the plaintiff, and it dismissed the complaint for failure to state a claim upon which relief could be granted. We affirm.

I

Ronald L. Goldfarb has lived in Virginia and practiced law in the District of Columbia for almost twenty-five years.[1] After several clients asked that he represent them in Virginia, Goldfarb applied in January 1983 for admission without examination to the Virginia bar. The Supreme Court of Virginia, pursuant to Va. Code § 54-67 and its Rule 1A:1(d), permits admission without examination only if an applicant who has been licensed five years in another state "intends to practice full-time as a member of the Virginia bar."[2] Because Goldfarb intended to divide his practice

[1] As the district court dismissed this suit under Fed.R.Civ.P. 12(b)(6), we accept as true the facts stated in the complaint and all reasonable inferences that favor the plaintiff. *Gardner v. Toilet Goods Association*, 387 U.S. 167, 172 (1967).

[2] Rule 1A:1 provides:

Any person who has been admitted to practice law before the court of last resort of any state or territory of the United States or of the District of Columbia may file an application to be admitted to practice law in this Commonwealth without examination, if counsel licensed to practice here may be admitted to practice there without examination.

The applicant shall:

(1) File with the clerk of the Supreme Court at Richmond an application, under oath, upon a form furnished by the clerk.

(2) Furnish a certificate, signed by the presiding judge of the court of last resort of the jurisdiction in which he is entitled to practice law, stating that he has been so licensed for at least five years.

(3) Furnish a report of the National Conference of Bar Examiners concerning his past practice and record.

(4) Pay a filing fee of fifty dollars.

between an office in Virginia and an office in Washington, he did not satisfy the Supreme Court requirement and his application was denied in November 1983.

The Supreme Court decision left open to Goldfarb two paths by which he could practice in both Virginia and Washington, D.C. First, he could take the Virginia bar examination: if he passed, he would then be free to open a part-time office in the Commonwealth. Second, he could appear *pro hoc* [sic] *vice* when asked to represent clients in Virginia, a procedure that he had previously followed but that he found unattractive due to the cost of paying affiliated local counsel.

Goldfarb instead pursued the path of admission without examination. He filed suit in the district court for the Eastern District of Virginia against the Supreme Court, its clerk, and its executive secretary. His complaint asserted that he would be admitted to the Virginia bar but for the restriction of Rule 1A:1(d), a restriction that placed an unreasonable burden on interstate commerce and deprived Goldfarb of due process of law. He asked that the court declare the rule to be unconstitutional and that it enjoin the Supreme Court from enforcing the rule and denying Goldfarb admission to the bar. The defendant moved to dismiss the action pursuant to Fed.R.Civ.P. 12(b)(6). The district court granted the motion, and Goldfarb appealed.

Thereafter, the Supreme Court will determine whether the applicant:

(a) Is a proper person to practice law.

(b) Has made such progress in the practice of law that it would be unreasonable to require him to take an examination.

(c) Has become a permanent resident of the Commonwealth.

(d) Intends to practice full time as a member of the Virginia bar.

In the determination of these matters the Supreme Court may call upon the applicant to appear personally before a member of the Court or its executive secretary and furnish such information as may be required.

If all of the aforementioned matters are determined favorably for the applicant, he shall be notified that some member of the Virginia bar who is qualified to practice before the Supreme Court may make an oral motion in open court for his admission to practice law in this Commonwealth.

Upon the applicant's admission he shall thereupon in open court take and subscribe to the oaths required of attorneys at law, whereupon he shall become an active member of the Virginia State Bar.

II

Goldfarb first suggests that Rule 1:A1(d) violates the Due Process Clause of the Constitution. He notes that "a state can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law." *Schware v. Board of Bar Examiners of New Mexico*, 353 U.S. 232, 239 (1957). The full-time commitment required for admission without examination, according to Goldfarb's analysis, shares no rational connection with his ability to practice law.

This due process challenge to the Virginia rule has been authoritatively rejected in *Brown v. Supreme Court of Virginia*, 359 F.Supp. 549 (E.D. Va.), *aff'd mem.* 414 U.S. 1034 (1973), a case essentially identical to the present action. Brown raised the same due process claims that Goldfarb now urges, along with additional equal protection arguments, when the Supreme Court of Virginia denied his application for admission without examination because he intended to divide his time between Virginia and Washington, D.C. *Application of Brown*, 213 Va. 282, 191 S.E.2d 812 (1972). A three-judge federal panel upheld the rule against Brown's constitutional challenge, finding that the requirement rationally served the interest of Virginia in insuring the competence of attorneys practicing in the Commonwealth. *Brown v. Supreme Court of Virginia*, 359 F.Supp. at 561-562. The summary affirmance of this decision by the United States Supreme Court necessarily agreed that a rational basis lay beneath Rule 1A:1(d), and we may not re-open that foreclosed question. *See Hicks v. Miranda*, 422 U.S. 332, 344-45 and n.14 (1975).

We recognize that Goldfarb's experience and familiarity with state law may be such that the full-time practice requirement is unnecessary to guarantee that he would ably serve the clients and courts that would depend on him in Virginia. But surely he suffers no more from the presumptions of Rule 1A:1(d) than did his counterpart in *Martin v. Walton*, 368 U.S. 25 (1961). The petitioner in that case lived in Kansas and practiced in Kansas City, Missouri. A Kansas rule required him, as a part-time practitioner,

to affiliate with local counsel for his Kansas appearances even though he had passed the Kansas bar examination, had published an article on Kansas procedure, and had served as city attorney for his Kansas town and as a member of the Kansas Board of Tax Appeals. *See Martin v. Davis*, 187 Kan. 473, 357 P.2d 782 (1960). The Supreme Court dismissed his due process challenge to the Kansas rule for want of a substantial federal question, holding that the full-time practice requirement—both on its face and as applied—was "not beyond the allowable range of state action under the Fourteenth Amendment." *Martin v. Walton*, 368 U.S. at 25-26. The same deference to state regulation is appropriate here. Our role is not to conduct an individual inquiry into Goldfarb's qualifications; Virginia offers a special hearing on that question through its bar examination. Our role is instead to determine whether Virginia has adopted a rational approach to the serious problem of attorney incompetence. We can only conclude that it has.

III

The existence of a relationship between Rule 1A:1(d) and a legitimate state goal resolves Goldfarb's Due Process Clause challenge. When a permissible purpose for the regulation has been established, we must still address its effect on interstate commerce. In that review, the rule "will be upheld unless the burden on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church*, 397 U.S. 137, 142 (1969). We hold that Rule 1A:1(d) does not constitute such an undue burden upon interstate commerce.

The "putative local benefit" of Rule 1A:1(d), as noted earlier, is that the full-time practice requirement promotes familiarity with Virginia law among attorneys who have not passed the state bar examination. *Brown v. Supreme Court of Virginia*, 359 F.Supp. at 561-562. This is surely a legitimate state purpose. The Supreme Court has recognized "the traditional authority of state courts to control who may be admitted to practice before them," *Leis v. Flynt*, 439 U.S. 438, 444 n.5 (1979) and "their broad power to establish standards for licensing practitioners and

regulating the practice of professions," *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975). At a time when proposals for specialty certification and continuing legal education have emerged to address public concern about lawyer competency, we decline to derogate the importance of Virginia's attempt to ensure that those who practice in its borders have some knowledge of its law.

In promoting this interest, Virginia could have required that all lawyers, including Goldfarb, take and pass the bar examination. Goldfarb concedes that this maximum burden lies within the state's power to impose. Virginia, however, has elected to provide the full-time practice option in lieu of an examination for those lawyers who have practiced elsewhere for five years. The state can hardly be penalized for offering a choice between a requirement it can concededly exact and one that many attorneys may find less onerous.

Goldfarb alleges that a less comprehensive bar examination, an in-state office, or a brief course in state law are means which would adequately serve the state's purpose while imposing a lesser burden on the flow of interstate commerce. "Less drastic means" analysis may play an important part in Commerce Clause jurisprudence, if the court finds that the means chosen by the state impose a substantial and unacceptable burden. *See Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951) ("[the challenged regulation] discriminates against interstate commerce. This it cannot do, even in the exercise of its unquestioned power to protect the health and safety of its people, if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available"). This does not imply, however, that every regulation imposed pursuant to the state's police power must automatically undergo strict scrutiny of means if plaintiff is able to point to some effect, however indirect, upon interstate commerce. Here the means chosen are, as noted earlier, concededly legitimate. Courts have consistently shown deference to special conditions imposed by states on applications for admission without examination. *See, e.g., Lowrie v. Goldenhersh*, 716 F.2d 401 (7th Cir. 1983); *Hawkins v. Moss*, 503 F.2d 1171 (4th

Cir. 1974). To require a hearing to weigh the relative impacts of all the other means the state might have chosen would deal a serious blow to the capacities of the states and localities to further even the most basic regulatory purposes. As the Commerce Clause is implicated by almost every economic regulation, *see Wickard v. Filburn*, 317 U.S. 111 (1942), and its shadow extends equally far, *see Philadelphia v. New Jersey*, 437 U.S. 617, 621-623 (1978), such hearings would be an almost constant process.

Although Goldfarb challenges the requirement of full-time practice in Virginia as "economic protectionism," it can as readily be viewed as a means of making available reciprocal admissions to the Virginia bar. Eleven states do not permit admission by reciprocity at all.[3] The life of admission by reciprocity has always been a checkered one,[4] and there exists the danger that ruling conditions on reciprocal admissions unconstitutional will chase states into the one certain sanctuary of a bar examination for all. We decline to risk a development that would defeat the values of interstate mobility among providers of professional services that it is our duty under the Commerce Clause to protect. The district court therefore correctly held, on the basis of the pleadings, that the benefits of Rule 1A:1(d) outweigh the burdens in the sense described by *Pike v. Bruce Church*.[5]

IV

Goldfarb argues that this reasoning mingles two different regulations when each rule must independently satisfy the Constitution. He notes that if the state offers admission without ex-

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[3] Hafter, Toward The Multistate Practice of Law Through Admission by Reciprocity, 53 Miss. L.J. 1, 44-47 (1983).

[4] *See generally* Hafter, *supra* n.3.

[5] Goldfarb argues that this balancing test prescribed by *Bruce Church* involves close consideration of the facts presented by each case and stresses that a complaint may not be dismissed under Fed.R.Civ.P. 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The district court concluded, as do we, that the benefit-burden analysis of *Pike v. Bruce Church* may be performed in this case without taking discovery or hearing evidence.

amination, it may not do so, for example, only for applicants of a particular race or religion or political affiliation. Eligibility for admission without examination, if conditioned on those grounds, would presumably have to withstand constitutional challenge on its own legs, not on the borrowed legs of the bar examination. Goldfarb reasons that the burden on interstate commerce of the full-time practice requirement must similarly be assessed in a factual inquiry that does not consider the alternative of the bar examination. According to his reply brief, "One's rights under the Commerce Clause are not different from, or inferior to, rights arising under other provisions of the Constitution for purposes of determining the legality of state regulation."

The constitutionality of state programs that condition eligibility on various grounds is an enormously complex congeries of subjects, far too complex to sustain Goldfarb's facile comparison. Here we obviously do not face Goldfarb's hypothetical Rule 1A:1(d) that conditions admission without examination on the basis of race or religion. But even if we accepted Goldfarb's best approach to such questions, we would still hesitate to find in the solutions a principle that would apply in constitutional contexts ranging from some hypothetical Third Amendment case to the instant Commerce Clause case. As Justice Frankfurter once wrote, "One of the most treacherous tendencies in legal reasoning is the transfer of generalizations developed for one set of situations to seemingly analogous, yet essentially very different, situations." *Braniff Airways, Inc. v. Nebraska State Board of Equalization*, 347 U.S. 590, 603 (1954) (Frankfurter, J., dissenting).

The decisive point is that the Commerce Clause is very different from even Goldfarb's most forceful interpretation of his offered parallel, the Equal Protection Clause. The Commerce Clause limits state authority in its grant of federal supremacy. The Equal Protection Clause, on the other hand, explicitly overrides state authority in its guarantee of individual rights. Goldfarb's hypothetical Rule 1A:1(d) would violate his Equal Protection Clause, regardless of the bar examination, because it violates an ineligible applicant's independent right to be treated like the can-

didates who are eligible under the rule.[6] The Commerce Clause in contrast creates no such personal claims. The relevant issue there is whether Virginia has in Rule 1A:1(d) exceeded the province of its state power by asserting unreasonable control over interstate commerce. And because the availability of the bar examination helps to define the extent of that assertion in a way that it cannot define the independent existence of identical treatment, we include the examination alternative in our Commerce Clause calculus although we ignore it for equal protection purposes. *Cf. Shapiro v. Cooke*, 552 F.Supp. 581 (N.D. N.Y. 1982), *aff'd* 702 F.2d 46 (2d Cir. 1983) ("if a state may constitutionally require all applicants to take the examination, the Commerce Clause is not offended by a rule which permits some, but not all, out-of-state attorneys to be admitted on waiver of the examination.")

V

Finally, we note that Goldfarb's Commerce Clause argument draws little support from recent cases invalidating state residency requirements for bar admission under the Privileges and Immunities Clause. *See especially Supreme Court of New Hampshire v. Piper*, _____ U.S. _____, 105 S.Ct. 1272 (1985). Goldfarb may not rely directly on the decisions because he is a Virginia resident, and the Privileges and Immunities Clause provides "no security for the citizen of the State in which [the privileges] were claimed." *The Slaughterhouse Cases*, 83 U.S. 36, 77 (1873).[7] Therefore, he attempts to rely on analogy to the decisions, alluding to the common history and the common purpose shared by the Commerce Clause and the Privileges and Immunities Clause. *See Hicklin v. Orbeck*, 437 U.S. 518, 531 (1978).

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[6] While indulging Goldfarb's equal protection concerns with imaginary Rules 1A:1(d) that discriminate on the basis of race or religion, it is perhaps appropriate to note that the real Rule 1A:1(d) does not violate the Equal Protection Clause. *Brown v. Supreme Court of Virginia*, 359 F.Supp. 549 (E.D. Va.), *aff'd mem.* 414 U.S. 1034 (1973).

[7] We therefore need not and do not determine the validity of Rule 1A:1(c), which limits admission without examination to Virginia residents, in the face of a constitutional challenge by a nonresident.

We, however, see no logical path from the challenged rule in *Supreme Court v. Piper*, which excluded from New Hampshire practice out-of-state residents who had passed the examination, to the challenged rule here, which would admit Goldfarb to Virginia practice if he but passed the bar. Given the important structural differences between the clauses, see L. Tribe, *American Constitutional Law* § 6-33, we cannot find such a route of correspondence in vague generalizations about "discrimination against those out-of-state." Several of the concepts involved in *Piper* are certainly implicated here on varying levels of abstraction, but the angle of connection is far too oblique to provide any leverage for overturning Rule 1A:1(d).

VI

Changing conditions in the American polity consistently deepen two of the most important problems before the legal profession—the need to expand public access to legal services and the need to maintain in those services a quality of representation that is equal to the inherent level of attorney responsibility. Rule 1A:1(d) represents part of an attempt by the Virginia Supreme Court to reconcile and resolve these sometimes conflicting but always pressing professional concerns. Whether a waiver of the bar examination for full-time practitioners is a wise approach to the issue is a matter for the judgment of Virginia. Whether the rule affords due process and respects federal primacy in interstate commerce is a matter for the judgment of the court. Because Rule 1A:1(d) is sound on both grounds, the judgment of the district court is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

RONALD L. GOLDFARB,

Plaintiff,

-vs-

CIVIL ACTION
NO. 84-508-A

SUPREME COURT OF VIRGINIA,
et al.,

Defendants.

Friday, July 13, 1984
Alexandria, Virginia

Transcript of Defendants' Motion to Dismiss or to Abstain in the above-captioned matter.

BEFORE:

The Honorable ALBERT V. BRYAN, JR., Judge
United States District Court

* * *

THE COURT: I don't think the Court ought to abstain. But while it is discretionary—you can have a seat—in a broad term of what rules the Virginia Supreme Court adopts as to its qualifications for attorneys to practice in the State of Virginia, this part of the rule is not, as I read it, discretionary on a case-by-case basis.

I don't understand that the Court could, without revising the rule, waive the requirement of the rule that a person who—a lawyer who wants to practice on a motion, as opposed to taking the Bar exam, devote his entire practice, full-time practice, in the State of Virginia. I don't think notions of comity and federalism

require abstention in this case. It's a broad attack on the rule itself. And I don't understand that the application of the rule is discretionary on a case-by-case basis.

So, reconsideration of Mr. Goldfarb's application would not—could not result in his being admitted on motion absent his agreement to practice full time in the State of Virginia or absent revision of the rules. So I don't think it's appropriate for the Court to abstain.

The facts don't appear to be in dispute. The plaintiff is a resident of the State of Virginia. He seeks admission to practice on motion as opposed to taking the Bar exam. He is barred by the portion of the Virginia Supreme Court rules which prohibit his being admitted on motion unless he agrees to devote his full time to practice in the State of Virginia.

It's a clear case, it seems to me, of whether this rule violates the Commerce Clause. I really don't see a great deal of due-process problem with the case, but the Commerce Clause is the principal prong of the plaintiff's attack. I think it's far from a frivolous argument, but it doesn't carry the day with me.

Given that the State could restrict its members or practitioners to those who take the Bar exam, it seems to me that when the Supreme Court elects to waive that, they can condition it in any manner that is not excessive and that does not discriminate in some invidious way. There is no equal-protection argument made here.

I can't say that the imposition of the requirement of full-time practice is clearly excessive. It may not be the best way, but—and the alternatives that the plaintiff suggests, such as a lesser exam, a bona fide office, provisional license, may be better. But the choice that the State has taken, the Supreme Court of Virginia has taken, of requiring full-time practice as its method of insuring that those who don't take the Bar exam, nevertheless, have sufficient exposure to Virginia law through the actual practice of that law, to insure that the consumers of his services are serviced by a competent practitioner, is not either an irrational decision or one that's clearly excessive.

Given the peculiar role of the State to set the qualifications for

practitioners of the legal profession, I think that that is not an irrational or clearly excessive choice.

There are alternatives, so that the burden on interstate commerce, it seems to me, is minimal, and certainly no more a burden than would be if the State insisted on practitioners all having to take the Bar exam before being allowed to practice, a position that I do not understand the plaintiff to argue or contest the right of the State to do.

The local counsel rule does have some economic protectionism aspects to it, but that's not either, in my view, so burdensome that it could be deemed either clearly excessive or undue burden. I think the motion to dismiss is well taken. For the reasons that I've expressed, it will be granted.

I'll prepare the order.

(Whereupon, the proceedings in the above-captioned matter were concluded.)

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

RONALD L. GOLDFARB,	)	
	)	
Plaintiff,	)	
	)	
V.	)	CIVIL ACTION NO.
	)	84-508-A
	)	
SUPREME COURT OF VIRGINIA,	)	
et al.,	)	
	)	
Defendants.	)	

ORDER

For the reasons stated from the bench, it is hereby ORDERED that:

1. The motion of the defendants to abstain in this action is denied.

2. The motion of the defendants to dismiss this action is granted, and this action is dismissed.

/s/ Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
July 13th, 1984

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

RONALD L. GOLDFARB,	)	
	)	
Plaintiff,	)	
	)	
V.	)	CIVIL ACTION NO.
	)	84-508-A
	)	
SUPREME COURT OF VIRGINIA, et al.,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

This action is before the court on the plaintiff's motion, made pursuant to F. R. Civ. P. 59(e), to alter the court's July 13, 1984 judgment granting the defendants' motion to dismiss.

The gist of the Rule 59 motion is that the viability of plaintiff's claim ought not to be considered until a more complete record is made, through discovery or trial.

This action attacks, on the ground it contravenes the Commerce Clause,[1] the Virginia Supreme Court rule requiring lawyers seeking admission to the Virginia bar without examination to intend to "practice full-time as a member of the Virginia Bar." Rule 1A:1(d), Rules of the Supreme Court of Virginia.

The court adheres to its view, expressed on July 13, 1984 that, given the right of Virginia to require *all* persons seeking admission to the Virginia bar to take an examination (a right plaintiff concedes), Virginia concomitantly has the right to relax such a re-

[1] A due process claim is also asserted, but was not pressed at argument on the motion to dismiss or in the Rule 59 motion.

quirement by imposing an alternative method to insure that lawyers practicing in her courts have and maintain a sufficient close association with Virginia laws and procedures so as to be competent in the practice of law in Virginia. Such an alternative or exception could not, of course, be based on a classification that discriminated, either because of some class-based criteria or residency. But no equal protection or privileges and immunities ground is asserted. Nor, consistent with substantive due process, could an arbitrary standard such as the color of one's hair define an exception. As indicated, no substantive due process claim is pressed, and the court can devine [sic] none from the pleadings. Whatever may be said of the requirement, it is neither arbitrary nor capricious for due process purposes. Nor is there any procedural due process involvement. The sole issue is whether the requirement of an intention to practice full-time in Virginia, as opposed to the alternatives proffered by plaintiff at argument, such as a continuing legal education program, a bona fide office, a provisional license, or some lesser examination for those who otherwise meet the strictures of Rule 1A:1, is an undue burden on interstate commerce. Plaintiff cites *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), as setting a standard that requires an inquiry whether the burden is "clearly excessive in relation to the putative local benefits." Here, unlike the regulation of the packing of cantaloupes involved in that case, the propriety of local regulation of the practice of law has long been recognized.

But even if the "clearly excessive" standard is correct, the extent of the burden simply cannot be as great as the burden of requiring *all* lawyers seeking admission to take an examination, a requirement Virginia concedely can exact without transgressing the Commerce Clause. This, in the court's view, is the dispositive issue in the case. Further discovery or trial, or both, could not but involve the court in a balancing test which ignores that proposition.

Virginia's decision as to how far and under what condition to relax the absolute requirement of an examination may not be the best decision, but it is not the court's prerogative to say she ought

to have relaxed it further, absent equal protection, due process or privilege and immunities considerations. No such considerations being present, the motion to amend the court's judgment will be denied.

/s/ Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
July 24, 1984

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

RONALD L. GOLDFARB,	)	
	)	
Plaintiff,	)	
	)	
V.	)	CIVIL ACTION NO.
	)	84-508-A
	)	
SUPREME COURT OF VIRGINIA, et al.,	)	
	)	
	)	
Defendants.	)	

ORDER

For the reasons set forth in the Memorandum Opinion this day filed, it is

ORDERED that the motion of the plaintiff to alter or amend the judgment of July 13, 1984 is denied.

/s/ Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
July 24, 1984

APPENDIX D

JUDGMENT

United States Court of Appeals

for the Fourth Circuit

No. 84-1928

Ronald L. Goldfarb, Appellant

v.

Supreme Court of Virginia;
Allen L. Lucy, Clerk, Supreme Court of
Virginia and Robert N. Baldwin, Executive Secretary,
Supreme Court of Virginia,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, Affirmed.

/s/ John M. Greacen
Clerk

FILED
JUL 3 1985
U.S. Court of Appeals
Fourth Circuit

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

JAMES W. STANLEY, JR., Plaintiff,	)	
vs.	)	No. 83-4434-CV-C-5
MISSOURI STATE BOARD OF LAW EXAMINERS, Defendant.	)	

ORDER

Pending before the Court are defendant's motion to dismiss and plaintiff's motion for summary judgment. Plaintiff James W. Stanley is a practicing attorney in North Little Rock, Arkansas, and a member in good standing of the Arkansas Bar. Defendant Missouri State Board of Law Examiners is an agency set up by the Missouri Supreme Court for the purpose of regulating admission to the Missouri Bar. *See* Mo. Sup. Ct. R. 8. In 1983, plaintiff submitted to defendant an application for admission to the Missouri Bar. This application was rejected for the express reason that plaintiff did not meet the residency requirement set forth in Mo. Sup. Ct. R. 8.13.[1] Plaintiff appealed defendant's decision to the Missouri Supreme Court, which upheld its residency rule and affirmed the action taken by defendant. The instant lawsuit followed. The essential issue before the Court is whether the residency requirement set forth in Mo. Sup. Ct. R. 8.13 is violative of plaintiff's federal constitutional rights.

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[1] Mo. Sup. Ct. R. 8.13 provides in relevant part:

No person shall be admitted to practice law in this State unless he is a bona fide resident of this State, or a resident of an adjoining county in an adjacent state who in good faith intends to maintain an office for the fulltime practice of law in this State.

I. The Piper Decision

This case is controlled by the United States Supreme Court's recent decision in *Supreme Court of New Hampshire v. Piper*, 105 S.Ct. 1272 (1985), where the Court struck down a New Hampshire Supreme Court rule which required residency in the state as a condition precedent to admission to the state bar. The Court reasoned that the residency requirement contravened the Privileges and Immunities Clause of the United States Constitution[2] by denying non-residents of New Hampshire the opportunity to practice their profession within the state on terms of substantial equality with state residents. *Id.* at 1276-81. In reaching its conclusion, the Court rejected the state's arguments that its residency rule was justified because non-resident attorneys "would be less likely: (i) to become, and remain, familiar with local rules and procedures; (ii) to behave ethically; (iii) to be available for court proceedings; and (iv) to do *pro bono* and other volunteer work." *Id.* at 1279. The policy interests underlying Mo. Sup. Ct. R. 8.13 are indistinguishable from the interests asserted by the state in *Piper*. Consequently, *Piper* dictates that Mo. Sup. Ct. R. 8.13 must fall beneath the weight of the Privileges and Immunities Clause.

Undaunted, defendant contends that *Piper* is distinguishable in two respects. First, defendant notes that Mo. Sup. Ct. R. 8.13 requires that an applicant intend to maintain an office for the full time practice of law in Missouri, while the New Hampshire rule contained no such provision. Second, defendant points out that the applicant in *Piper* lived only 400 yards from the New Hampshire border, while the plaintiff in the instant case lives approximately 200 miles from the Missouri border. The Court fails to see how either of these distinctions is in any sense material. As defendant notes, Justice White filed a concurring opinion in *Piper* in which he seems to stress the importance of the physical proximity of the applicant to the New Hampshire border. Nevertheless, the other seven members of the *Piper* majority did not rely on this fact; to the contrary, they gave every indication that the Privileges and Im-

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[2] U.S. Const. Art. IV, § 2, cl. 1.

munities Clause prohibits residency rules which operate against residents of distant states as well as adjacent states. *See id.* at 1280 (describing less restrictive alternatives available to states for dealing with lawyers who reside "at a great distance."). Accordingly, the defendant's arguments for distinguishing *Piper* from the instant case must be rejected.

II. Res Judicata

Defendant's final argument is that the instant lawsuit is barred by the principle of *res judicata* because plaintiff has already litigated the identical issues in state court. If not for the *Piper* case, defendant's *res judicata* argument would be an attractive one. It is true that plaintiff had unsuccessfully litigated the rejection of his bar application before the Missouri Supreme Court. In that litigation, plaintiff had specifically claimed that Mo. Sup. Ct. R. 8.13 violated the Privileges and Immunities Clause of the United States Constitution. Under these circumstances, ordinary principles of *res judicata* dictate that plaintiff should be barred from relitigating this issue. *See Allen v. McCurry,* 449 U.S. 90, 101 S.Ct. 411 (1980); *Southern Jam, Inc. v. Robinson*, 675 F.2d 94 (5th Cir. 1982); *see also* 28 U.S.C. § 1738; Restatement, Second, Judgments § 86 (1982).

Here, however, plaintiff's constitutional claim comes within a well-established exception to the general rule of *res judicata*: a second action is not barred when the "judgment in the first action was plainly inconsistent with the fair and equitable implementation of a statutory or constitutional scheme." Restatement, Second, Judgments §26(1)(d) (1982). The Restatement's illustration of this exception to the rule is analogous to the instant case:

> "A et al., black pupils and parents bring suit against the B board of education to invalidate and enjoin the operation of a state school "tuition grant" law on the ground that it fosters racial discrimination and is therefore unconstitutional. The court holds the law constitutional as applied and enters judgment for the defendant. Appeal is not taken, and is not warranted by the state of the law at the time of the judgment.

> Thereafter, the United States Supreme Court in another action between different parties strikes down as unconstitutional a similar tuition grant law of another state. A et al. then commenced a new action against the B board seeking the relief that was denied in the previous action. Whether or not the claims in the two actions by A et al. are regarded as the same, the second action is not barred by the first judgment. In a matter of such public importance the policy of nationwide adherence to the authoritative constitutional interpretation overcomes the policies supporting the law of *res judicata.*"

Id. § 26, comment e, illustration 6. In the instant case, it clearly would be inequitable to plaintiff and would undermine the *Piper* holding to rule that plaintiff's present lawsuit is barred because he had the foresight to challenge Missouri's residency requirement in the state court system back in 1983. Accordingly, this Court holds that plaintiff's present lawsuit is not barred by the doctrine of *res judicata.*

III. **Remedy**

The final question to be decided by this Court concerns the remedy to which plaintiff is entitled. In his complaint, plaintiff sought an order enjoining defendant from applying Mo. Sup. Ct. R. 8.13 *and* requiring that plaintiff be admitted to the Missouri Bar. In his Supplemental Motion for Summary Judgment, plaintiff modified his prayer for relief and requested that the Court enjoin enforcement of the residency rule *and* direct defendant to find and recommend to the Missouri Supreme Court that plaintiff "fully meets the requirements for admission to the Missouri Bar." In light of the ruling herein concerning the constitutionality of Mo. Sup. Ct. R. 8.13, this Court will, of course, enjoin defendant from denying plaintiff's application to the Bar on the basis of that rule.

Nevertheless, this Court will not order that plaintiff be admitted to the Bar. Nor will the Court direct defendant to find that plaintiff "fully meets" the requirements for admission to the Bar.

There has been no admission by defendant in this case that plaintiff satisfies all of the requirements for admission to the Bar; indeed, it appears that the Board of Law Examiners did not process plaintiff's application once it determined that he was ineligible on non-residency grounds. In addition, the Court notes that every applicant for admission to the Bar must demonstrate that he is of good moral character. Such a determination necessarily involves the exercise of discretion on the part of the Board. This Court must be careful not to encroach upon that discretion. Therefore, the Court will decline making plaintiff a member of the Missouri Bar by judicial fiat; it should be sufficient to declare Mo. Sup. Ct. R. 8.13 unconstitutional and to enjoin defendant from enforcing Mo. Sup. Ct. R. 8.13 with respect to plaintiff's application for admission to the Missouri Bar.

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss is overruled. It is further

ORDERED that plaintiff's motion for summary judgment is sustained. It is further

DECLARED that Mo. Sup. Ct. R. 8.13 is unconstitutional. It is further

ORDERED that the Missouri State Board of Law Examiners, its agents, assigns, employees, representatives, successors and affiliates are enjoined from enforcing Mo. Sup. Ct. R. 8.13 with respect to plaintiff's application for admission to the Missouri Bar.

/s/ Scott O. Wright
SCOTT O. WRIGHT
United States District Judge

Date: May 3, 1985

APPENDIX F

PERTINENT CONSTITUTIONAL PROVISIONS AND RULES

The Commerce Clause of the United States Constitution, art. I, sec. 8, cl. 3, states that:

> The Congress shall have Power. . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . .

Amendment XIV, section 1 of the United States Constitution states that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Rule 1A:1 of the Supreme Court of Virginia provides as follows:

> Any person who has been admitted to practice law before the court of last resort of any state or territory of the United States or of the District of Columbia may file an application to be admitted to practice law in this commonwealth without examination, if counsel licensed to practice here may be admitted to practice there without examination.

The applicant shall:

> (1) File with the clerk of the supreme court at Richmond an application, under oath, upon a form furnished by the clerk.
>
> (2) Furnish a certificate, signed by the presiding judge of the court of last resort of the jurisdiction in which he

is entitled to practice law, stating that he has been so licensed for at least five years.

(3) Furnish a report of the National Conference of Bar Examiners concerning his past practice and record.

(4) Pay a filing fee of fifty dollars.

Thereafter, the supreme court will determine whether the applicant:

(a) Is a proper person to practice law.

(b) Has made such progress in the practice of law that it would be unreasonable to require him to take an examination.

(c) Has become a permanent resident of the commonwealth.

(d) Intends to practice full time as a member of the Virginia bar.

In the determination of these matters the supreme court may call upon the applicant to appear personally before a member of the court or its executive secretary and furnish such information as may be required.

If all of the aforementioned matters are determined favorably for the applicant, he shall be notified that some member of the Virginia bar who is qualified to practice before the supreme court may make an oral motion in open court for his admission to practice law in this commonwealth.

Upon the applicant's admission he shall thereupon in open court take and subscribe to the oaths required of attorneys-at-law, whereupon he shall become an active member of the Virginia State Bar.

Rule 1A:3 of the Supreme Court of Virginia states as follows:

Following receipt of evidence satisfactory to the supreme court that a person who has been admitted to practice pursuant to Rule 1A:1 no longer satisfies the requirements of clause (c) or (d) of that section or that a person who has been admitted to practice pursuant to Rule 1A:2 no longer satisfies the requirement of clause (c) of that section, the supreme court may revoke the

license issued to him. Following receipt of evidence that a person who has been admitted to practice pursuant to Rule 1A:1 or Rule 1A:2 has been disbarred pursuant to Part Six of the rules, the supreme court will revoke the license issued to him.